Petition

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81-910

CASE NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,
Petitioners,

v.

DON A. ADAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS FOR REVIEW

I. WHETHER THE LOWER FEDERAL COURTS CAN DISCHARGE RESPONDENT CONTRARY TO WAINWRIGHT V. SYKES AND FLORIDA LAW WHERE RESPONDENT REQUESTED AN IMPROPER LESSER INCLUDED OFFENSE, MADE NO OBJECTION TO THE CHARGE, AND THEREAFTER WAS CONVICTED OF THE CHARGE?

II. WHETHER THE LOWER FEDERAL COURTS CAN DENY THE STATE OF FLORIDA A JUDGMENT AND SENTENCE FOR CRIMINAL ACTIVITY PROHIBITED UNDER FLORIDA LAW?

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OPINIONS OF THE COURTS BELOW

The Fourth District Court of Appeal of Florida affirmed Respondent's judgment and sentence for attempted perjury in a per curiam decision without written opinion. Adams v. State, 320 So.2d 58 (Fla. 4th DCA 1975) (Appendix A). The Florida Supreme Court initially granted a writ of certiorari, but later withdrew it by an order which stated the court was without jurisdiction to review the appellate decision (Appendix B). The Florida Supreme Court denied habeas corpus relief by an order rendered December 9, 1976 (Appendix C). The trial court denied a motion for post conviction relief pursuant to Fla.R.Cr.P. 3.850 on March 15, 1977 (Appendix D). The Fourth District Court of Appeal affirmed the trial court's order per curiam without

an opinion on October 4, 1978 (Appendix E). The United States District Court for Middle District of Florida granted Respondent's Petition for Writ of Habeas Corpus on March 31, 1978 (Appendix F). The Fifth Circuit Court of Appeals deferred its decision on the habeas corpus proceeding pending certification of the following question to the Florida Supreme Court, Adams v. Murphy, 598 F.2d 982 (5th Cir. 1979) (Appendix G):

> Is attempted perjury in an official proceeding a criminal offense under the laws of Florida?

The Florida Supreme Court rendered its decision on January 29, 1981. Adams v. Murphy, 394 So.2d 411 (Fla. 1981) (Appendix H). On August 14, 1981, the Fifth Circuit issued its opinion affirming the order of the United States District Court for the Middle District

of Florida (Appendix I).

JURISDICTION

On August 14, 1981, the Fifth Circuit Court issued its opinion (Appendix I). On September 17, 1981, the Fifth Circuit Court of Appeals denied Petitioner's Petition for Rehearing (Appendix J). On October 21, 1981, the Fifth Circuit Court of Appeals granted Petitioner's Motion for Stay of Mandate up to and including October 26, 1981 (Appendix K). On October 26, 1981, Petitioners filed an Emergency Application for Continuation of Mandate and/or Recall of Mandate with the United States Supreme Court (Appendix L).

Jurisdiction is invoked in accordance with the provisions of 28 U.S.C.1254.

Cases in the courts of appeal may be reviewed by the Supreme Court by the

following methods:

(1) By writ of certiorari granted upon the petition to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS

§837.02 Florida Statutes (1973):
Whoever being lawfully required to depose the truth in any proceeding in a court of justice, commits perjury, shall, if the perjury is committed on the trial of an indictment for a capital crime, be guilty of a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084; and if committed in any other case, guilty of a felony of the second degree, punishable as provided in §775.082 or §775.083.

§776.04 Florida Statutes (1973):
Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in the execution of the same, shall, when no express provision is made by law for the punishment of such attempt, be punished as follows:...

28 U.S.C. 2254(d):
In any proceeding instituted in a

federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct ...

STATEMENT OF THE CASE

Respondent, Don A. Adams, was indicted for the offense of perjury by the Grand Jury in Osceola County, Florida, on August 3, 1974 (Appendix M). At the charge conference at trial, Respondent's counsel specifically requested the court to give the jury an instruction on attempted perjury as a lesser included offense of the crime of perjury:

COURT: Have both of you looked at and approved the verdicts?

MR. DAUKSCH: No, I haven't looked at

them. That is the one thing I apologize to the court for. I didn't do it. How about attempted perjury?

COURT: Well, do you think that is a lesser included offense?

MR. DAULKSCH: Well, I don't know. I think that the courts have held that everything has an attempt to it.

COURT: You want an attempt? I am not certain there is such a crime, but if you want it I'll put it in there.

MR. DAUKSCH: I do specifically request it.

COURT: All right, fine.

* * * * * * *

COURT: I have had Mrs. Stenhop prepare an instruction on the verdict on attempt, and I have included that. Is that what you wanted?

MR. DAUKSCH: Yes, sir. (R 493, 564)

The court so charged the jury, who then returned a guilty verdict of attempted perjury. Respondent was subsequently placed on probation for a period of five years (Appendix N).

An appeal was taken from the conviction to the Fourth District Court of Appeal in Florida. Respondent alleged that the indictment under which he was charged was defective in that it failed to sufficiently allege the matters that were being considered by the Grand Jury at the time of the alleged perjury and he alleged that a jury verdict of attempted perjury was improper. The court affirmed per curiam without opinion on September 26, 1975.

Respondent sought a Petition of Certiorari in the Florida Supreme Court alleging that his due process rights were violated when he was convicted of the attempted perjury. The Florida Supreme Court initially granted the Writ of Certiorari but later withdrew it by order dated November 4, 1976, stating that the

court was without jurisdiction to review the Fourth District Court of Appeal's decision.

Respondent filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court alleging that he was being illegally restrained on an invalid verdict and judgment. The Florida Supreme Court denied the petition on December 9, 1976. Respondent subsequently filed a Motion for Post Conviction Relief with the Circuit Court in Osceola County, Florida, stating that serious discrepancies existed in trial testimony. On March 15, 1977, the trial court denied relief and on October 4, 1978, the Fourth District Court of Appeal affirmed the trial court's order per curiam without opinion.

Respondent filed a Petition for Writ of Habeas Corpus in the United

States District Court, Middle District of Florida, pursuant to 28 U.S.C. §2254 alleging that his due process rights had been violated because he had been adjudicated guilty of attempted perjury. On December 9, 1977, that court found that Respondent had adequately exhausted his state remedies. After holding that there could be no offense of attempted perjury, the court granted Respondent's Petition for Habeas Corpus on March 31, 1978.

Petitioner appealed the Middle District's order to the Fifth Circuit Court of Appeals. After briefs on the merits were submitted and oral argument was heard, the court in Adams v. Murphy, 394 So.2d 411 (Fla. 1981) answered the question in the negative stating that the crime of perjury is fully proven by an

attempt to commit perjury.

On August 14, 1981, the Fifth Circuit Court of Appeals issued its opinion affirming the order of the Middle District Court and stating that the Writ for Habeas Corpus must issue as Respondent went "to prison for an act that is not and has never been a crime under Florida law." On September 17, 1981, the Fifth Circuit denied Petitioner's Petitioner's Petition for Rehearing. On October 21, 1981, the Fifth Circuit granted Petitioner's Motion for Stay of Mandate up to and including October 26, 1981. Petitioners filed an Emergency Application for Continuation of Stay and/or Recall of Mandate on October 26, 1981 with this Honorable Court.

ARGUMENT I

In Wainwright v. Sykes, 433 U.S. 72 (1977), this Honorable Court stated that federal habeas corpus review is barred absent a showing of "cause" and "prejudice" attendant to a state procedural waiver. There are sound policy reasons why a state procedural rule requiring a contemporaneous objection deserves deference from federal courts:

> (1) it is a rule employed by a coordinate jurisdiction within the federal system and for the many interests it serves in its own right;
> (2) it enables the record to be made with respect to the federal constitutional claim when the recollections of witnesses are freshest; and
> (3) it enables the judge who observes the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.

Where is the prejudice in this case when Respondent received all of the benefits? Respondent requested the jury be

instructed on attempted perjury, did not object to the charge, and therefore, was convicted of attempted perjury. See, Davis v. United States, 411 U.S. 233 (1973); United States v. Frady, 636 F.2d 506 (D.C. 1980)cert. den.___U.S.___(1981).

As the Fifth Circuit points out in its opinion (Appendix I), counsel did not merely invite the error, but he demanded the erroneous charge given. Counsel, deliberately, as a matter of trial strategy, which proved to be successful, not only waived these grounds, but in fact, should be estopped to assert them. See, Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968). After bargaining for a detriment and getting what he wanted, Respondent now wants not the best of both worlds but the whole world.

Not only did the Fifth Circuit Court

of Appeals decide a federal question in a way which conflicted with applicable decisions of this Court, but the Fifth Circuit decided a federal question in conflict with the Florida Supreme Court. In Ray v. State, ___So.2d ___(Fla. 1981) 1981 FLW 549 (Case No. 57,795, Op. filed July 30, 1981) (Appendix 0) the Florida Supreme Court Court held:

> It is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if:
> (1) the improperly charged offense is lesser in degree and penalty than the main offense or
> (2) the defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action.
> Failure to timely object precludes relief rom such a conviction.

It is clear that the second prong of Ray v. State, is directly applicable to

the case at bar. Respondent demanded the improper charge and therefore, he is precluded from relief of his conviction.

Furthermore, in Sumner v. Mata, ___ U.S. ___, 28 Cr.L. 3061 (1981) the court spelled out the limited nature of review by federal courts pursuant to 28 U.S.C. §2254.

This Court stated:

> This interest in federalism recognized by Congress in enacting §2254(d) requires deference by federal courts to factual determinations of all state courts. This is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court and where there was no reason for the state trial court to consider the issue because respondent failed to raise the issue at that level.

As the trial court and appellate courts in the State of Florida declined to

grant respondent relief, the federal courts were barred from considering these issues as there was no showing of "cause" and "prejudice."

Despite the applicable decisions of this Court, the Florida Supreme Court and the limited nature of review provided federal courts on a petition for habeas corpus, the federal courts nevertheless substituted their judgment for that of the state courts and erroneously discharged the Respondent.

ARGUMENT II

In Adams v. Murphy, 598 F.2d 982 (5th Cir. 1979), the Fifth Circuit certified the following question to the Florida Supreme Court:

> Is attempted perjury in an official proceeding a criminal offense under the laws of Florida?

The Florida Supreme Court in Adams v. Murphy, 394 So.2d 411 (Fla. 1981) stated that because the law in Florida did not fully define the crime of perjury, it would look to the common law for the definition of the crime. In so doing, the court analyzed its general attempt statute and adopting the reasoning in Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1970)stated:

> Just as the crime of uttering a forged instrument may be proven merely by an attempt to negotiate one...the offense of making a false report is fully proven by demonstrating an attempt to convey false information to a police officer ...'There can be no attempt to commit...' a crime which 'is itself an attempt to do an act or accomplish a result.'

The court concluded that "the crime of perjury is fully proven by an 'attempt' to commit perjury." The Fifth Circuit interpreted this language to mean that

the jury acquitted Respondent of the crime of perjury and therefore, Respondent's discharge was necessitated.

The Fifth Circuit's opinion clearly conflicts with the opinion of the Florida Supreme Court. The Florida Supreme Court stated that the crime of attempted perjury is nonexistent under its attempt statute and thus as a separate crime. But, evidence of an attempt to perjure can convict a person of perjury. In McIntyre v. State, 380 So.2d 1064 (Fla. 2nd DCA 1980), the court eloquently stated that although attempted grand theft is not a crime it is "not nonexistent in the sense that the activity encompassed by such a crime is not a crime. Rather, the legislature has simply merged this crime with the crime of grand theft." As there was an overt act

of a willful false statement constituting criminal activity, the jury found Respondent guilty of perjury; the crime of perjury encompasses attempted perjury. There has never been any allegation at any stage of the proceedings that there was no overt act of a willful false statement. Therefore, the Fifth Circuit's conclusion that the jury acquitted Respondent of perjury is a legal impossibility for when the jury returned a verdict finding that Respondent attempted to commit perjury, in law, they found him guilty of perjury for they are in law one and the same. By discharging Respondent, the lower federal courts denied the State of Florida a judgment and sentence for criminal activity prohibited under the laws of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished, by United States Mail, to JOSEPH F. McDERMOTT, ESQUIRE, 544 First Avenue North, St. Petersburg, Florida 33701, this _____ day of November, 1981.

_____
Of Counsel

_____
Of Counsel

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT
JULY TERM 1975

DON A. ADAMS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 74-1767
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

Decision filed September 26, 1975.

Appeal from the Circuit Court for Osceola County; Cecil II. Brown, Judge.

James C. Dauksch, Jr., Orlando for appellant.

Robert L. Shevin, Attorney General, Tallahassee, Frank B. Kessler, Assistant Attorney General, and Paul Zacks, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

WALDEN, C.J., OWEN and DOWNEY, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1976

DON A. ADAMS, Petitioner,	CASE NO. 48,347
v.	DCA CASE NO.74-1767
STATE OF FLORIDA, Respondent.	

Opinion filed November 4, 1976

Writ of Certiorari to the District Court of Appeal, Fourth District

Joseph F. McDermott of McDermott and Ohle, for Petitioner

Robert L. Shevin, Attorney General; and Paul H. Zacks, Assistant Attorney General, for Respondent.

PER CURIAM.

The Petition for Writ of Certiorari reflected probable jurisdiction in this Court. The Writ was issued, and upon further consideration

of the matter and hearing argument, we have determined that the Court is without jurisdiction. Therefore, the Writ must be and is hereby discharged and the Petition for Writ of Certiorari is dismissed.

It is so ordered.

OVERTON, C.J., BOYD, ENGLAND, SUNDBERG and HATCHETT, J.J. Concur

App.4
APPENDIX C

IN THE SUPREME COURT OF FLORIDA
THURSDAY, DECEMBER 9, 1976

DON A. ADAMS,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 50,621
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

CC: Hon. Joseph F. McDermott
Hon. Robert L. Shevin
Hon. Frank B. Kessler
Hon. E.J. Comiskey, Clerk

App.5
APPENDIX D

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA, : INDICTMENT NO. 74-142
Plaintiff,
:
v.
:
DON A. ADAMS,
Defendant. :
:

ORDER

This Court having received Defendant's Motion for Post Conviction Relief under RCrP 3.850 and upon examining said motion, files, and records pertaining to said case they conclusively show Defendant is entitled to no relief. RCrP 3.850 requires Defendant be a prisoner in custody and the Court finds no holding that a probationer is a prisoner in custody under contemplation of Rule 3.850 RCrP, it is upon consid-

eration thereof

ORDERED and ADJUDGED that the motion of the Defendant under RCrP 3.850 be, and the same is hereby denied.

DONE and ORDERED in chambers at Kissimmee, Osceola County, Florida this 15th day of March, 1977.

/s/ Cecil Brown
CIRCUIT JUDGE

Copies to:
Office of the State Attorney
Mr. Joseph F. McDermott, Esq.

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

DON A. ADAMS, Appellant,	)	
v.	)	CASE NO. 77-1374
STATE OF FLORIDA, Appellee.	)	

Decision filed October 4, 1978.

Appeal from the Circuit Court for Osceola County; Cecil H. Brown, Judge.

Joseph F. McDermott, St. Petersburg, for Appellant.

Robert L. Shevin, Attorney General; Tallahassee, and Paul H. Zacks, Assistant Attorney General, West Palm Beach, for Appellee.

PER CURIAM.

Affirmed.

DOWNEY, C.J., CROSS and LETTS, J.J., concur.

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DON A. ADAMS,

Petitioner,

vs. Case No. 77-48-Orl-Civ-Y

ERNEST P. MURPHY, Sheriff of Osceola County, and LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida,

Respondents.
_____/

MEMORANDUM OPINION

This cause came before the Court for hearing on the petition of Don A. Adams for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner alleges that the respondents, Ernest P. Murphy and Louie L. Wainwright, have illegally held him in custody as a result of his conviction by a jury on November 8, 1974 in the Circuit Court in and for Osceola County, Florida of

attempted perjury. This conviction is alleged to be in violation of petitioner's right to due process under the Fourteenth Amendment to the United States Constitution because attempted perjury is not a crime cognizable under the laws of the State of Florida.

Petitioner was indicted on August 3, 1974 for the crime of perjury, in violation of Section 837.02, Florida Statutes. Section 837.02 provides:

> "Whoever being lawfully required to depose the truth in any proceeding in a court of justice, commits perjury, shall be punished if the perjury is committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life or any term of years; and if committed in any other case, by imprisonment in the state prison not exceeding twenty years."

The indictment charged petitioner testified falsely while under oath before a grand jury proceeding.

After conclusion of the presentation of evidence at petitioner's trial, the Circuit Court held a charge conference with counsel in the case, outside the hearing of the jury. During this conference, the following colloquy took place:

BY THE COURT:

Have both of you looked at and approved the verdicts?

BY MR. DAUKSCH [petitioner's counsel]:

No, I haven't looked at them. That is the one thing I apologize to the Court for. I didn't do it.
How about attempted perjury?

BY THE COURT:

Well, do you think that is a lesser included offense?

BY MR. DAUKSCH:

Well, I don't know. I think that the courts have held that everything has an attempt to it.

BY THE COURT:

You want an attempt? I am not certain there is such a crime,

but if you want it I'll put it in there.

BY MR. DAUKSCH:

I do specifically request it.

BY THE COURT:

All right. Fine.

Therefore, the Circuit Court instructed the jury, in part, as follows:

> "It is a crime for any person to attempt to commit an offense prohibited by law and in such attempt do any act toward the commission of such offense. The charge of perjury includes a charge of the lesser offense of an attempt to commit that crime. An attempt to commit a crime consists of the formation of an intention to commit that particular crime at that particular time and place, and the doing of some physical act toward and which was intended to accomplish the commission of the crime. The act done must be more than mere preparation to commit the crime. It must be one intended to actually do the wrong which constitutes the crime . . . ."

The jury found petitioner guilty of the crime of attempted perjury.

An appeal was taken from the conviction to the Florida Fourth District Court of Appeal. Petitioner sought reversal of his conviction on two grounds. First, he alleged the indictment under which he was charged was defective in that it failed to allege sufficiently the matters that were being considered by the grand jury at the time of the alleged perjury; and secondly, petitioner argued a lack of evidence to support the verdict of attempted perjury. The Fourth District Court of Appeal affirmed in a one-line per curiam decision rendered on September 26, 1975.

Certiorari was sought by petitioner to the Florida Supreme Court. That court initially granted the writ for certiorari, but later withdrew it by an order which stated the Court was without jurisdiction to review the Court of

Appeal decision. Petitoner subsequently filed a petition for writ of habeas corpus with the Florida Supreme Court and a motion under Rule 3.850, Fla.R.Crim.P., for post-conviction relief with the Circuit Court in Osceola County, both of which were denied. By an order entered December 9, 1977 this Court found petitioner had adequately exhausted his state remedies. Therefore this Court has jurisdiction to entertain petitioner's claim on its merits.

The sole issue for determination by this Court is whether there can exist under the laws of Florida the crime of attempted perjury. The fact that the indictment under which petitioner was charged failed to specifically charge an attempt is irrelevant in light of Florida case law.

Beginning with the decision in

Brown v. State, 206 So.2d 377 (Fla. 1968) a long line of Florida cases hold that pursuant to Rule 3.510, Fla.R.Crim.P., a trial judge must instruct the jury in every criminal case on the subject of an attempt to commit the substantive crime charged. This is because Florida law requires the jury to be instructed on lesser included offenses in every case, even if the evidence adduced at trial is such that the trial court finds no reasonable jury could infer that the substantive crime charged was not in fact committed. The theory is one of jury pardon. Lomax v. State, 345 So.2d 719 (Fla. 1977).

Section 777.04(1), Florida Statutes Annotated, provides:

> "Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in

> the perpetration or is intercepted or prevented in the execution of the same, commits the offense or criminal attempt. . . ."

Respondent argues that this general attempt statute, when combined with the requirements of Rule 3.510, Fla.R.Crim.P. as interpreted by the Brown line of cases supports petitioner's conviction in the case at bar.

On first blush respondent would appear to be correct. But not every substantive offense recognized under Florida law carries with it an attempt. See King v. State, 339 So.2d 172 (Fla. 1976). The trial court must charge the jury on the subject of an attempt only if - as a matter of law - an attempt to commit the crime charged would itself constitute an offense under Florida law. Brown v. State, 206 So.2d at 381.

The respondent has argued that

because the jury instruction on attempt was given at the insistence of defense counsel, the doctrine of waiver applies so that petitioner is now estopped from challenging his conviction based on such an instruction. The Florida Fourth District Court of Appeal has refused to apply the concept of waiver in similar circumstances where defense counsel failed to object to the giving of an attempt instruction. An erroneous attempt instruction for a non-existent offense is fundamental error in Florida. Silvestri v. State, 332 So.2d 351, 354 fn.2 (4th D.C.A. Fla. 1976), aff'd per curiam, 340 So.2d 928 (Fla. 1976).

Even if this were not the law in Florida, this Court would not be without jurisdiction to entertain petitioner's challenge. Petitioner may not be convicted of a purported crime which does

not exist under the law merely because his defense counsel might have stipulated to it. Only the Legislature may proscribe by law what acts are to constitute crimes. Neither the courts nor defense counsel may do so without violating a defendant's right to due process under the Fourteenth Amendment. See Bouie v. Columbia, 378 U.S. 347 (1964).

This Court has not been made aware of any Florida decisions which pass on the question of whether attempted perjury is an offense under Florida law. If such an offense exists it would have to arise out of the general attempt statute, Section 777.04(1), F.S.A. Looking to the language of that statute the Court fails to discern how the statute could apply to perjury.

The general attempt statute appears to contemplate substantive crimes which

consist of more than one overt act on the part of the accused. An attempt is committed when the accused does some overt act towards commission of the crime, but fails for some reason in completing the other act or acts necessary to complete commission of the crime. A crime with only one overt act which is itself an attempt can not support a lesser included offense under the general attempt statute, because there can be no such thing as an attempt of an attempt. Hutchinson v. State, 315 So.2d 546 (2d D.C.A. Fla. 1975).

Perjury consists of testifying falsely under oath. Either one does or one does not. There are no preparatory acts short of the completed offense. Absent the ability to peer into the mind of an accused to view his intent, courts must look to overt acts done by the

accused and draw inferences of intent from those acts. A conviction for attempted perjury would be a conviction for intent alone.

For example, a person may intend to lie under oath when questioned before a grand jury. Prior to his appearance in the grand jury room he may even tell others of his intent to lie. Yet, if he gets cold feet at the very last second and answers all questions truthfully, then surely he has committed no crime. The same would be true if once he begins to testify under oath he is asked none of the questions he intended to give false answers to. Until he is actually asked a question and given the opportunity to give a false answer under oath, there are absolutely no actions he can take to attempt perjury.

Respondent has called the Court's

attention to the common law crime of an attempt to procure the commission of perjury. 70 C.J.S. Perjury §80 (1951). An attempt "to procure" perjury is much different from an attempt to commit perjury. An attempt to procure perjury involves solicitation of another to commit perjury and is deemed an attempt because the other person does not have to actually commit perjury. The law proscribes the act of solicitation of the completed crime regardless of whether the solicitation is successful in influencing the other person to commit perjury.

Counsel for both sides are in agreement that only one reported decision from any jurisdiction in this country has construed the crime of attempted perjury. The Supreme Court of Louisiana held in State v. Latiolais, 225 La. 878, 74 So. 2d 148 (1954) that there can be an

attempt to commit perjury. This Court first notes that unlike the rest of the jurisdictions in the United States, Louisiana has not adopted the common law or proceeded in the common law tradition of jurisprudence. Aside from this distinction, however, the reasoning employed by the Louisiana Supreme Court in finding attempted perjury to be a crime has been implicitly rejected by Florida courts.

The Louisiana court found first that the offense of perjury consisted of two elements -- a specific intent to make a false statement under oath and the making of the statement. Even if these two elements were satisfied, the court reasoned it might still be impossible to find an accused guilty of the completed crime under some circumstances. As an example the Louisiana Supreme Court stated:

"if the board or official for

> some reason was not legally authorized to take testimony, or if the one administering the oath was not authorized or qualified to administer it, there would in law be no offense of perjury but only an attempted offense, because completion of the crime of perjury would be frustrated by extraneous circumstances."

74 So.2d at 150.

Without testing the soundness of this reasoning, it is enough to say that no common law court appears to have reached a similar conclusion. Florida courts have reached results which implicitly reject the reasoning as well. In the case of Silvestri v. State, 340 So.2d 351 (4th DCA Fla. 1976), aff'd per curiam 340 So.2d 928 (Fla. 1976) the same Florida District Court of Appeal which affirmed petitioner's conviction per curiam held that Florida law does not recognize the crime of attempting to make a false report of a crime to a law

enforcement officer.

The Fourth District Court of Appeal reasoned that the offense of making a false report is fully proven by demonstrating an attempt to convey false information to a police officer. Therefore there can be no separate offense of an attempt to make a false report because there can be no attempt to commit a crime which is itself an attempt to do an act or accomplish a result. On this basis Florida courts have held there can be no attempt to utter a forged instrument, King v. State, 339 So.2d 172 (Fla. 1976), and no attempt to commit conspiracy, Hutchinson v. State, 315 So.2d 546 (2d D.C.A. Fla. 1975).

Had the Florida Fourth District Court of Appeal adopted the Louisiana reasoning it might have found that one could attempt to give false information

to a police officer. For example, if the police officer were out of his jurisdiction or if the person the accused talked to appeared to be a police officer but was not, then in law there would be no offense but only an attempted offense on the part of the accused. In Florida, however, there is no attempted offense for giving false information to a police officer.

Likewise, this Court holds there can be no offense of attempted perjury. Because the offense does not exist, the Circuit Court in petitioner's case erred in charging the jury on the subject of an attempt. This error violated petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution. Therefore, separate judgment will be entered in accordance with this opinion granting

petitioner a writ of habeas corpus.

DATED at Orlando, Florida,

this 31st day of March, 1978.

/s/ George C. Young
CHIEF JUDGE

Copies to:

Joseph F. McDermott, Esquire
544 First Avenue, North
St. Petersburg, Florida 33701

Harry M. Hipler, Esquire
Assistant Attorney General
225 Pan American Building
West Palm Beach, Florida 33401

Robert Eagan, Esquire
State Attorney
250 N. Orange Avenue
Orlando, Florida 32801

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DON A. ADAMS,

Petitioner,

vs. Case No. 77-48-Orl-Civ-Y

ERNEST P. MURPHY, Sheriff of Osceola County and LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida,

Respondents.

_____/

JUDGMENT

In accordance with the Memorandum Opinion entered simultaneously herewith the petition for writ of habeas corpus be and is hereby granted. Execution of the writ shall be stayed during that period of time under applicable rules in which respondent is permitted to file a notice of appeal from this decision and execution of the writ shall be further stayed during the pendency of any appeal so

taken.

SO ORDERED in Chambers at Orlando, Florida, this 31st day of March, 1978.

/s/ George C. Young
CHIEF JUDGE

Copies to:

Counsel of record

APPENDIX G

DON A. ADAMS,
Petitioner-Appellee,

v.

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,
Respondents-Appellants.

NO.78-2406

United States Court of Appeals,
Fifth Circuit

July 13, 1979

Benedict P. Kuehne, Asst. Atty. Gen., West Palm Beach, Fla., for respondents-appellants.

Joseph F. McDermott, St. Petersburg, Fla., for petitioner-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before THORNBERRY, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

The court has determined that this case presents a question of Florida law appropriate for resolution by the courts of that state. We will, therefore, defer

our decision in this matter pending certification of the issue to the Florida Supreme Court.[1*] Our usual practice is to request that the parties submit a proposed statement of facts and proposed agreed certificate of the questions for decision, but because the facts are uncontested and because the question to be certified is a narrow one, we have drafted the Statement of Facts and the Question for Certification.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO SECTION 25.031, FLORIDA STATUTES 1975, AND RULE 4.61, FLORIDA APPELLATE RULES

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Fifth Circuit that the above-styled case in this Court involves a question or proposition of law of the

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*Footnotes at end of opinion

State of Florida which may be determinative of the cause, and there appear to be no clear, controlling precedents in the decisions of the Supreme Court of Florida. The United States Court of Appeals for the Fifth Circuit therefore certifies the following question of law of the State of Florida to the Supreme Court of Florida for instructions concerning such question of law, based on the facts recited herein, pursuant to section 25.031, Florida Statutes 1975, and Rule 4.61, Florida Appellate Rules, as follows:

1. Style of the case. The style of the case in which this certificate is made is as follows: Don A. Adams, petitioner-appellee, versus Ernest P. Murphy and Louie L. Wainwright, respondents-appellants, Case No. 78-2406, United States

Court of Appeals for the Fifth Circuit, on appeal from the United States District Court for the Middle District of Florida.

II. Statement of facts. Petitioner Adams was indicted in 1974 for the crime of perjury, in violation of section 837.02, Florida Statutes. Adams was charged with testifying falsely while under oath before a grand jury proceeding. After all the evidence had been presented at Adams' trial, the Florida trial court held a charge conference with counsel. The Attorney who represented Adams affirmatively requested[2*] that the jury be given a lesser-included offense instruction on the crime of attempted perjury. Although the trial judge expressed uncertainty about whether attempted perjury was a crime, he in-

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*Footnotes at end of opinion

cluded the requested instruction in his charge to the jury.[3*] The jury found Adams guilty of the crime of attempted perjury.

Petitioner appealed his conviction to the Florida Fourth District Court of Appeal, which affirmed in a one-line per curiam decision. Certiorari was initially granted by the Florida Supreme Court but was later withdrawn for want of jurisdiction. Adams subsequently filed a petition for a writ of habeas corpus with the Florida Supreme Court, raising a contention that no crime of attempted perjury existed under Florida law. Relief was denied by the Florida Supreme Court without written opinion in an order dated December 9, 1976.

Following an unsuccessful motion for

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*Footnotes at end of opinion

post-conviction relief pursuant to Fla. R. Crim. P. 3.850, Adams filed a petition for habeas corpus relief in the United States District Court for the Middle District of Florida. After finding that Adams had exhausted his state remedies, the district court granted relief and held, relying on Silvestri v. State, 332 So. 2d 351 (4th Dist. Ct.App. Fla.), aff'd per curiam, 340 So.2d 928 (Fla.1976), that attempted perjury was not a crime under the laws of Florida. Thus, the court below agreed with Adams that instructing the jury on attempted perjury was a violation of due process of law and that his conviction and incarceration for a nonexistent offense violated the fourteenth amendment of the United States Constitution.

III. Question to be certified to the

Florida Supreme Court. Is attempted perjury in an official proceeding a criminal offense under the laws of Florida?

The entire record in this case, together with copies of the briefs of the parties, and all the papers are transmitted herewith.

CERTIFIED.

1* See In re McClintock, 558 F 2d 732 (5th Cir. 1977).

2* The pertinent discussion took place as follows:

> BY THE COURT: Have both of you looked at and approved the verdicts?
>
> BY MR. DAUKSCH (Adams' counsel): No, I haven't looked at them. That is the one thing I apologize to the Court for. I didn't do it.
> How about attempted perjury?
> BY THE COURT: Well, do you think that is a lesser included offense?
> BY MR. DAUKSCH; Well, I don't know. I think that the courts have

held that everything has an attempt to it.

BY THE COURT: You want an attempt? I am not certain there is such a crime, but if you want it I'll put it in there.

BY MR. DAUKSCH: I do specifically request it.

BY THE COURT: All right. Fine.

3* The circuit court charged the jury, in part, as follows:

It is a crime for any person to attempt to commit an offense prohibited by law and in such attempt do any act toward the commission of such offense. The charge of perjury includes a charge of the lesser offense of an attempt to commit that crime. An attempt to commit a crime consists of the formation of an intention to commit that particular crime at that particular time and place, and the doing of some physical act toward and which was intended to accomplish the commission of the crime. The act done must be more than mere preparation to commit the crime. It must be one intended to actually do the wrong which constitutes the crime.

4* We repeat an oft-stated principle:

[T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved in the issues as the Supreme Court perceives them to be

in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or insubordinate or even contingent parts.
Martinez v. Rodriguez, 394 F.2d 156, 159 n.6 (5th Cir. 1968).

APPENDIX H

DON A. ADAMS,
Petitioner-Appellee,

v.

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,
Respondents-Appellants.

NO. 57451

Supreme Court of Florida

Jan. 29, 1981

Joseph F. McDermott, St. Petersburg, for petitioner-appellee.

Jim Smith, Atty. Gen. and Benedict P. Kuehne and Paul H. Zacks, Asst. Attys. Gen., West Palm Beach, for respondents-appellants.

BOYD, Justice

This cause is before the Court on the certificate of the United States Court of Appeals for the Fifth Circuit that a question of Florida law upon which there is no controlling precedent is determinative of the instant appeal pending in

that court. Adams v. Murphy, 598 F.2d 982 (5th Cir. 1979). We have authority to answer the certified question by written opinion. Fla.R.App.P. 9.510.

Adams was charged with the crime of perjury in violation of section 837.02, Florida Statutes (1973). It was alleged that he had lied to a grand jury. At trial, Adams' attorney requested that the court instruct the jury on the crime of attempt to commit perjury. The court gave the requested instruction and the jury returned a verdict finding Adams guilty of attempted perjury.

On appeal, the judgment of conviction of attempted perjury was affirmed, per curiam, without opinion. Adams v. State, 320 So.2d 58 (Fla. 4th DCA 1975). Adams then sought review in this Court. The Court initially issued the writ of certiorari but later determined that it

lacked jurisdiction. The writ was discharged. Adams v. State, 339 So.2d 214 (Fla. 1976). A subsequent petition for writ of habeas corpus, filed in this Court, was denied.

The case is pending in the Fifth Circuit on appeal from an order of the United States District Court for the Middle District of Florida, which granted Adams relief on his petition for writ of habeas corpus. The district court ruled that the Florida trial court's instruction on and judgment of conviction of the nonexistent offense of attempted perjury denied due process. The United States Court of Appeals has certified the following question: "Is attempted perjury in an official proceeding a criminal offense under the law of Florida?"

Section 837.02, Florida Statutes (1973),

provides:

> Whoever being lawfully required to depose the truth in any proceeding in a court of justice, commits perjury, shall, if the perjury is committed on the trial of an indictment for a capital crime, be guilty of a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084; and if committed in any other case, guilty of a felony of the second degree, punishable as provided in §775.082 or §775.083.

Thus the statute forbids, but does not fully define, the crime of perjury. In such circumstances, it is appropriate to look to the common law for the definition of the crime. Carnley v. State, 88 Fla. 281, 102 So. 333 (1924).

In the decisional law of Florida, perjury is defined as the willful giving of false testimony under lawful oath on a material matter in a judicial proceeding. E.g., Gordon v. State, 104 So.2d 524 (Fla. 1958); Miller v. State, 15 Fla. 577 (1876).

Appellees-respondents, officials of the State of Florida, argue that there is such a crime as attempted perjury. They suggest that the existence of such a crime is logically plausible for the following reasons. An attempt consists of a specific criminal intent to commit the crime and an overt act beyond preparation toward that end. Therefore, one who intentionally testifies falsely under oath, unaware that the testimony is not material or that the person administering the oath has no authority to do so or that the proceeding is not an official judicial proceeding, commits the crime of attempted perjury.

Appellees-respondents correctly state that an attempt to commit crime consists of two essential elements: a specific intent to commit the crime and an

overt act, beyond mere preparation, done towards its commission. Turner v. State, 100 Fla. 1078, 130 So. 617 (1930); Gustine v. State, 86 Fla. 24, 97 So. 207 (1923). The intent and the act must be such that they would have resulted, except for the interference of some cause preventing the carrying out of the intent, in the completed commission of the crime. The State of Florida has incorporated this definition in its general attempt statute:

> Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in the perpetration, or is intercepted or prevented in the execution of the same, shall when no express provision is made by law for the punishment of such attempt, be punished as follows:

§776.02, Fla.Stat. (1973). Thus the state officials' argument is that where

the intent and the overt act of falsely testifying are shown, but the crime is not completed because one of the other elements is lacking, then the facts establish the crime of attempted perjury.

Even though we have a broadly applicable general attempt statute in Florida, there are some crimes of which it can be said that the attempt thereof simply does not exist as an offense. See, e.g., State v. Thomas, 362 So.2d 1348 (Fla. 1978)(attempted possession of burglary tools is not a crime); King v. State, 317 So.2d 852 (Fla. 1st DCA 1975)(attempted uttering of a forged instrument is not a crime).

In King v. State, the defendant was charged with uttering a forged instrument. At trial, he asked that the jury be charged on attempt pursuant to Florida

Rule of Criminal Procedure 3.510. The court refused. The defendant was convicted and on appeal assigned the refusal to instruct as error. The appellate court said: "If a crime is itself an attempt to do an act or accomplish a result, there can be no attempt to commit that crime." Id. at 853. Applying this principle, the court held that under Florida law there is no offense of attempted uttering of a forged instrument, and therefore the refusal to charge on attempt was proper.

This view of the nature of criminal attempts was also expressed in Hutchinson v. State, 315 So.2d 546 (Fla. 2d DCA 1975), where the state prosecuted a solicitation as an "attempted conspiracy." The court analyzed the general attempt statute. The court prefaced its analysis

as follows:

> In construing a criminal statutory provision, the primary function of the court is to give effect to the intent of the legislature; and in so doing, each section of the criminal code should be considered in making this determination. But it is also axiomatic that statutes creating and defining crimes cannot be extended by construction or interpretation to punish an act, however wrongful, unless clearly within the intent and terms of the statute. Bradley v. State, 1920, 79 Fla. 651, 84 So. 677.

Id. at 547. The court then observed that the general attempt statute by its terms can apply to any offense, but went on to explain why conspiracy is an exception:

> We note that §776.04 purports to prohibit an attempt to commit any offense prohibited by law. Since there is no express limitating language as to what crimes may or may

not be criminally attempted, the statute would appear to prohibit attempted conspiracy if it were not for the remaining language of the statute, and the history and judicial construction of the crime of attempt. Construing the words "and in such an attempt does any act toward commission of such an offense but fails in the perpetration, or is intercepted or prevented in the execution of the same," we think the legislature intended to limit attempts to physical acts carried beyond preparation toward proximate accomplishment of what would be a complete crime. In this respect, solicitation and conspiracy are more remote from the actual perpetration of the intended crime than is an attempt to commit it. This conclusion is supported by Florida courts that have interpreted an attempt to consist of two essential elements: 1) a specific intent to commit the crime; and 2) a separate overt ineffectual act done toward its commission; Robinson v. State, Fla.App.3d 1972, 263 So.2d 595; Groneau v. State, Fla.App.4th 1967, 201 So.2d 599; Gustine v. State, 1923,

86 Fla. 24, 97 So. 207.

Id. at 547-548.

The Florida case that is perhaps most closely analogous to the problem we are presented with now is Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976). There the appellant was charged with, among other things, making a false report of a crime. She was convicted of an attempt to make such a false report. The court compared the problem to that of uttering a forged instrument, discussed above:

> Just as the crime of uttering a forged instrument may be proven merely by an attempt to negotiate one. Harrell v. State, 79 Fla. 220, 83 So. 922 (1920), so it would seem, the offense of making a false report is fully proven by demonstrating an attempt to convey false information to a police officer. Thus, the holding of the First District in King v. State, 317 So.2d 852 (Fla.App. 1st

> 1975) which we followed in Jackson v. State, 328 So.2d 457 (Fla.App. 4th 1976) that there is no offense in Florida of attempted uttering of a forged instrument because "there can be no attempt to commit ..." a crime which "is itself an attempt to do an act or accomplish a result" ... 317 So.2d at 853, directly applies. See People v. Schmidt, 76 Misc.2d 976, 352 N.Y.S.2d 399, 403 (Crim.Ct. 1974)(no offense of "attempted 'interference with governmental administration'").

We find this reasoning to be directly applicable to the question of whether there can be an attempt to violate section 837.02, Florida Statutes (1973).

We are not persuaded by the argument that the crime of attempt can be extended to cover attempted perjury. The argument is based on the hypothetical where the intention to perjure is frustrated by the absence of an element extraneous to

the offender's actions, such as the authority of the person administering the oath. In the typical case of a criminal attempt the factor distinguishing the attempt from the completed crime is that the intended criminal result, an element of the completed crime, was not achieved. In a case for example, of murder, or robbery, or arson, there is an interference or intervention preventing the consummation of the criminal intent: the victim did not die, or the robber did not get away with any money, or the fire went out without causing damage. The absence of the element of a criminal result is different from the absence of an element extraneous to the offender's conduct, such as the element of the authority of the person administering the oath.

The lack of such elements of the

crime of perjury as the materiality of the testimony, the lawfulness of the oath, or the official judicial nature of the proceeding is not, we think, what is contemplated by the common law and statutory concepts of failure, intervention, interception or prevention. When the elements of materiality, lawful oath, and official judicial proceeding are established, the crime of perjury is fully proven by an "attempt" to commit perjury. That is, it is fully proven by the overt act of a willful false statement. That the false statement be believed is not an element of the crime of perjury. Miller v. State, 15 Fla. 577 (1876). Thus no criminal result such as a miscarriage of justice need be proved to establish the crime. As in Silvestri, the crime is fully proven by showing an "attempt" to commit the

crime. We conclude that there can be no crime of attempted perjury.

We answer the certified question in the negative. We direct the Clerk of the Court to return the case file and transmit a true copy of this opinion to the United States Court of Appeals for the Fifth Circuit.

It is so ordered.

SUNDBERG, C.J., and ADKINS, J., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

ALDERMAN, J., dissents with an opinion, with which ENGLAND and McDONALD, J.J., concur.

OVERTON, Justice, concurring in part, dissenting in part.

I concur in the finding that attempted perjury is not a crime, but, under the facts of this case, I would advise the Fifth Circuit Court of Appeals that this

cause must be remanded for a new trial and that the defendant should not be discharged.

By his counsel, the defendant in this cause directly induced the trial court to include attempted perjury as a lesser included offense. He now contends he is entitled to a discharge because the judge granted this request and the government failed to object. Our criminal justice system will reach a new height in ridiculousness if a defendant through his counsel can cause erroneous verdict choices or alternatives to be presented to the jury and then walk free because of the problem he created. This is not justice and should not be allowed under any circumstances. At most, the defendant is entitled to a new trial.

ALDERMAN, Justice, dissenting.

Where there is an intent to commit perjury and there is an overt act of falsely testifying but the crime is not completed because one of the essential elements of the crime of perjury, such as materiality, is lacking the facts establish attempted perjury. The majority explains the elements of perjury and the definition of attempt, yet, inconsistently with its definitions, concludes that the crime of perjury is fully proven by an attempt to commit the crime of perjury and that, therefore, there is no such crime of attempted perjury. This cannot be true because if materiality or the authority of the person administering the oath is lacking, then there can be no crime of perjury. However, if any one of these particular elements is lacking,

yet defendant has formulated an intention to commit perjury during an official proceeding and has done a physical act intended to accomplish the commission of the crime other than mere preparation to commit the offense but has failed in the actual commission of the offense, then he has committed attempted perjury. I would, therefore, answer the certified question in the affirmative.

ENGLAND and McDONALD, J.J., concur.

APPENDIX I

DON A. ADAMS,
Petitioner,

v.

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,
Respondents.

No. 78-2406

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Aug. 14, 1981

Appeal from the United States District Court for the Middle District of Florida

Before THORNBERRY, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

Like the Wonderful Tar Baby, this habeas case possesses amazing adhesive qualities; no sooner is one set of issues settled than another arises. Its facts and lengthy procedural history are set out in our earlier certification opinion, reported at

598 F.2d 982 (5th Cir. 1979). We need repeat only a little of this here.

Petitioner Adams was charged with testifying falsely to a Florida grand jury. At the close of evidence in his state trial, defense requested a charge on "attempted perjury" as a lesser-included offense.[1*] Though expressing doubt that such a crime existed, the trial court charged the jury both on perjury and "attempted perjury." Obedient to Murphy's Law,[2] the jury brought Adams in "guilty of the lesser included offense of attempted perjury."

After exhausting Florida remedies, Petitioner sought habeas of our district court, which concluded that no such offense as attempted perjury existed under Florida law and granted

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* Footnotes at end of opinion.

the writ on due process grounds. On the state's appeal to us, we determined that the Florida law was doubtful as to the existence of such a crime as attempted perjury and certified that question to the ever-helpful Florida Supreme Court.[3] In due course that court replied--in a four to three decision--that Florida law recognizes no such crime as attempted perjury. Adams v. Murphy, 394 So.2d 411 (Fla. 1981).[4] Florida now argues that since the error was invited by defense counsel--as surely it was--the writ should not issue. Indeed, to be candid, we must put the matter somewhat higher: counsel did not merely invite, he demanded the erroneous charge given.

Even so, Adams must go free. Florida has told us that he went to

prison for an act that is not and has never been a crime under Florida law. Counsel's tactical choices may, in many circumstances, effectively contribute to his client's conviction. Advantages foregone for ephemeral benefits do not necessarily eventuate in writs. But only a legislature can denounce crimes. In a more complex case, we might proceed upon a more limited rationale, might resort to the solace of prior authority. Here there is no need. Nowhere in this country can any man be condemned for a nonexistent crime.[5]

It may be that the jury semi-pardoned Adams, by convicting him of the non-existent, lesser-included offense. Even if this be so, there can be no doubt that it acquitted him

of perjury; he can therefore never be tried again for that offense. Nor, of course, can he be called to account for the nonexistent crime. The district court was right. The writ must issue.

AFFIRMED.

---

[1] Florida has a general attempts statute, Fla. Stat. §706.04 (1973).

[2] "If anything can go wrong, it will."

[3] Which has rejected none of our more than 30 requests for assistance, made in the course of the last 20 years.

[4] In a special concurrence, one of the Florida justices emphasized the invited nature of the trial error and the basic injustice involved in freeing petitioner on such a ground. While we sympathize with the latter sentiment, we are unable to avoid the perhaps unfortunate result in this particular case, concluding, as we must and do, that the law demands it for reasons that transcend a given case.

[5] To be distinguished are such decisions as Grier v. United States,

472 F.2d 1157 (5th Cir. 1973), and Smedberg v. United States, 448 F.2d 401 (5th Cir. 1971), which concern merely the waiver of defenses by an informed guilty plea. The analog to our case in that context would be a plea of guilty tendered to a non-existent offense, say, ogling, as a lesser-included one to a charge of rape.

APPENDIX J

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

UNIT B

NO. 78-2406

DON A. ADAMS,

Petitioner,

v.

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,

Respondents.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING

(September 17, 1981)

Before THORNBERRY, GOLDBERG, and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas Gibbs Gee
United States Circuit Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

October 21, 1981

Ms. Andrea T. Mohel
Assistant Attorney General
Department of Legal Affairs
Palm Beach Regional Service Center
111 Georgia Avenue, Room 204
West Palm Beach, FL. 33401

No. 78-2406 - DON A. ADAMS - v. -

ERNEST P. MURPHY, ET AL.

(District Court No. 77-48-ORL-CIV-Y)

MANDATE STAYED TO AND INCLUDING

October 26, 1981 *

NORMAN E. ZOLLER, Clerk

By: Joyce Larkin
Deputy Clerk

cc: Mr. Joseph F. McDermott

* Petitioner has inserted the relevant portions and deleted the procedural aspects of the rule.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term,

19

No. 78-2406

D.C.DOCKET No. 77-48-ORL-CIV-Y

DON A. ADAMS,

Petitioner - Appellee,

versus

ERNEST P. MURPHY, Sheriff of Osceola County and LOUIE L. WAINWRIGHT, Director, Division of Corrections, Department of Offender Rehabilitation,

Respondents - Appellants.

Appeal from the United States District Court for the Middle District of Florida Before THORNBERRY, GOLDBERG and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard

on the transcript of the record from the United States District Court for the Middle District of Florida, and was orally argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

ISSUED AS MANDATE:

APPENDIX L

UNITED STATES SUPREME COURT

ERNEST P. MURPHY and LOUIE L. WAINWRIGHT, Petitioners, v. DON A. ADAMS, Respondent.	CASE NO.

EMERGENCY APPLICATION FOR CONTINUATION OF STAY

Petitioners, by and through their undersigned counsel, herein request this Honorable Court pursuant to Rule 44 of the Supreme Court Rules to continue the Stay of Mandate issued by the Eleventh Circuit Court of Appeals or in the alternative to recall Mandate. As grounds, Petitioners state as follows:

1. On October 21, 1981, the Eleventh Circuit Court of Appeals

granted Petitioners' Stay of Mandate pending application of certiorari to this Court.

2. As shown by the face of this Order, Petitioners did not receive this Order until October 26, 1981, the day that mandate was supposed to issue.

3. By granting Petitioners' Motion, the Eleventh Circuit indicated that Petitioners had viable grounds to seek the certiorari jurisdiction of this Court. See, Motion for Stay in Eleventh Circuit, attached.

4. If this Court does not continue the Stay of Mandate, Respondent will be discharged from custody and may leave the jurisdiction.

5. Petitioners will, in good faith, file a timely Petition for Certiorari.

6. The Eleventh Circuit has been notified of this pending Emergency Application for Continuation of Stay of Mandate and/or Recall of Mandate.

WHEREFORE, Petitioners respectfully request this Honorable Court to continue Stay of Mandate for an additional period of thirty (30) days.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

Andrea T. Mohel

ANDREA T. MOHEL
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, FL. 33401
(305) 837-5062

Counsel for Petitioners

Robert L. Bogen

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Emergency Application for Continuation of Stay of Mandate has been furnished, by United States Mail, to JOSEPH F. McDERMOTT, ESQUIRE, P.O. Box 268, 544 First Avenue North, St. Petersburg, Florida 33731, and HONORABLE NORMAN E. ZOLLER, CLERK, United States Court of Appeals, Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, this 26th day of October, 1981.

Andrea T. Mohel
Of Counsel

APPENDIX M

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT
OSCEOLA COUNTY, FLORIDA
SPRING TERM, 1974

STATE OF FLORIDA,

v.

DON A. ADAMS

INDICTMENT NO. 74-142

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, duly called, empanelled and sworn to inquire and true presentment make in and for the body of the County of Osceola, upon their oaths do present and charge that:

1. On the 31st day of July, 1974, in Osceola County, Florida, in violation of Florida Statute 837.02, DON A. ADAMS having duly taken an oath that he would testify truthfully in a

proceeding in a court of justice, to-wit, in an investigation there and then being conducted by the duly empanelled and sworn Osceola County Grand Jury, while testifying before said Grand Jury in said proceeding, and while under oath as aforesaid, did wilfully commit perjury by there and then wilfully giving false testimony on a material matter in said judicial proceeding as hereinafter set forth.

2. At the time and place alleged, the said Osceola County Grand Jury was conducting an investigation to determine whether or not a police car of the City of Kissimmee had been struck by bullets at the Sunrise Shopping Center in Kissimmee, or at the Kissimmee Airport.

3. It was material to said

investigation that the Grand Jury locate, examine or have examined by experts certain samples of automobile paint in the form of chips allegedly found by witnesses at the Kissimmee Airport in the morning following the said shooting of that car, which paint the said Don A. Adams allegedly delivered or caused to be delivered to a crime laboratory at Sanford, Florida.

4. On said date of July 31, 1974, the said Don A. Adams, appearing as a witness as aforesaid, contrary to the oath taken by him to testify truthfully, did wilfully testify and make declarations with respect to material matter which he knew to be false, to-wit, that he had not received back from the Sanford Crime Laboratory the automobile paint samples which had been taken

there for examination, in the following language, to-wit:

Q. Did you bring the paint samples back from the crime lab?

A. No, sir. I have the report from the crime lab. They have the paint samples, as far as I know, Mr. Eagan.

Q. Do you have --

A. (Interposing) No, sir. I have a copy.

Q. Let me say this, Chief, Mr. Ragsdale told me that he gave the paint samples back to you and you left there with them. Now, that is another one of the discrepancies.

A. Well--

Q. (Interposing) I am just reporting what he told me. I am not saying it is a fact, I am just conveying the information. He said that you stood there by him while they ran the test.

A. I sure stood there. And this, Mr. Eagan, is the report, the second line from the bottom on the second page shows that he retained it. That's all I know. If I had brought the paint back, I certainly would have carried it.

When I say that, Mr. Eagan, it is possible that Sgt. O'Brien brought the paint back.

According to this report, it says that he retained the paint.

Whereas in truth and in fact, on the occasion referred to in his aforesaid testimony, an employee of the said crime lab did return to the said Don A. Adams, by delivery, the aforesaid paint samples.

A TRUE BILL

William T. Mutter 8/3/74
Foreman of the Grand Jury

As authorized and required by law, I have advised the Grand Jury returning this indictment.

Robert Eagan
ROBERT EAGAN,
State Attorney
9th Judicial Circuit of
Florida

Filed and presented in Open Court, in the presence of the Grand Jury, this 3rd day of August, 1974.

HARRIS G. DANIEL
Clerk of the Circuit Court

By Mattie R. Wilson
Deputy Clerk

APPENDIX N

IN THE CIRCUIT COURT
OSCEOLA COUNTY, FLA.

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 74-142

DON A. ADAMS,

Defendant.

This cause coming on this day to be heard before me, and you, the defendant DON A. ADAMS, being now present before you having been found guilty by the verdict of a jury of the offense of ATTEMPTED PERJURY

The court hereby adjudges you to be guilty of said offense; and

It appearing to the safisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should suffer the penalty authorized by law.

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld, and that you are hereby placed on probation for a period of Five (5) years under the supervision of the Florida Parole and Probation Commission and its supervisors, such

suprevision to be subject to the provisions of the laws of this State.

It is further ordered that you shall comply with the following conditions of probation: . . . .

DONE AND ORDERED IN OPEN COURT, this the 28th ay of January, 1977.

/s/ Cecil Brown
Judge

* Petitioner has only inserted the relevant portions of the judgment and deleted the various conditions of probation.

APPENDIX O

JOHN HUNTER RAY
Petitioner

v.

STATE OF FLORIDA
Respondent

NO. 57,795

Florida Supreme Court

July 30, 1981

Lawrence E. Stabb and David Paul Montgomery of Stabb & Montgomery, Bradenton, Florida, for Petitioner.

Jim Smith, Atty. Gen., and Eula Tuttle Mason, Asst. Atty. Gen., Tampa, Florida for Respondent.

(McDONALD, J.) We have accepted jurisdiction to resolve conflict created by Ray v. State, 374 So.2d 1002 (Fla. 2d DCA 1979), and Causey v. State, 307 So. 2d 197 (Fla. 2d DCA 1975) Art.V, sec.3 (b)(3), Fla.Const.(1972). The issue to be determined is whether a defendant convicted of a crime for which he was

not charged, but which was submitted to the jury as a lesser included offense when in fact it was not, may challenge that conviction when he failed to object to the submission of the crime to the jury. We quash the instant decision.

Under sec. 794.011(5),F.S.(1975),[1*] an information alleged that Ray "did commit a sexual battery upon...,a person over the age of eleven, without her consent, and in the process thereof used physical force and violence not likely to cause serious personal injury." Besides instructing on sexual battery, the trial court also instructed the jury on committing a lewd and lascivious act as a lesser included offense of sexual battery. The jury convicted Ray of lewd

---

*Footnotes at end of opinion

assault as proscribed by sec.800.04, F.S. (1975).[2]

Two days after the jury rendered its verdict, Ray filed motions for a new trial and to arrest judgment. As grounds for relief, these motions alleged that Ray was convicted of an offense not charged because lewd assault is not a lesser included offense of sexual battery. The trial court denied both motions and Ray appealed his conviction and sentence to the district court. That court affirmed the conviction.

An incomplete record was presented to the district court. Specifically, the charge conference had not been recorded. Trying to fill this gap, the court ordered a reconstruction of the conference. In response, defense counsel neither admitted nor denied requesting the lewd

and lascivious charge and stated that upon the court's announcement that the charge would be given, neither counsel objected to or commented on the charge at any time. The prosecutor agreed with this statement, but considered it unlikely that the charge was not discussed. The judge responded that at the time of Ray's trial she never charged on a lesser included offense unless requested to do so by one of the parties.

The lack of a complete record, even as reconstructed, placed the Second District in the unenviable position of having to guess at what occurred during the charge conference.[3] After scrutinizing the record as reconstructed, the court found that Ray could, and should, have objected to the improper instruction at several points in the proceedings. Concluding that any "error was invited--

if not induced," the district court held that he had waived any error or else was estopped to claim error for the first time on appeal. 374 So.2d at 1003.

To dispose of this case, we must first determine whether committing a lewd and lascivious act on a minor under the age of fourteen is a lesser included offense of sexual battery of a person over the age of eleven. In Brown v. State, 206 So.2d 377 (Fla. 1968), this Court identified four categories of lesser included offenses. Committing a lewd and lascivious act is not a necessarily lesser included (type 3) offense of sexual battery. Walker v. State, 351 So.2d 382 (Fla. 4th DCA 1977). Nor is it a category 4 lesser included offense in the instant case because the information did not contain all the elements specified in sec. 800.04. Sec id.; Brown. It

is also not "lesser" because both sec. 794.011(5) and sec. 800.04 are second-degree felonies. Thus, Ray was convicted of a crime for which he was not charged and which was not a permissible lesser included offense of the crime for which he was charged.

Ray claims that convicting him of a crime not charged constitutes fundamental error which is per se reversible. To support this claim, Ray relies on Minor v. State, 329 So.2d 30 (Fla. 2DCA 1976); Haley v. State, 315 So.2d 515 (Fla. 2DCA 1975); O'Neal v. State, 308 So.2d 569 (Fla. 2DCA), overruled in Roberts v. State, 320 So.2d 832 (Fla. 2DCA 1975); Causey v. State, 307 So.2d 197 (Fla. 2DCA 1975); and Johnson v. State, 226 So.2d 884 (Fla. 2DCA 1969). In these cases, the Second District found that erroneous instructions on

lesser included offenses are, indeed fundamental error.

These Second District cases are unanimous in characterizing faulty instructions on lesser included offenses as fundamental error regardless of the defendant's failure to object.[4] The Fourth District Court of Appeal reached the same conclusion in Falstreau v.State, 326 So.2d 194 (Fla. 4th DCA 1976), and Priester v. State,294 So.2d 421 (Fla. 4th DCA 1974). All of these cases speak of fundamental error; in other cases, erroneous lesser included instructions have been found to be reversible, but not fundamental, error. See Smith v. State, 365 So.2d 405 (Fla. 3d DCA 1978); Hicks v. State, 362 So.2d 730 (Fla. 3d DCA 1978, cert. denied, 370 So.2d 461 (Fla. 1979); Walker v. State, 351 So.2d 382

(Fla. 4th DCA 1977); Evanco v. State, 318 So.2d 535 (Fla. 1st DCA 1975). In all of the cases finding that an erroneous instruction produced a conviction for a crime not charged only one (Hicks) says that the defendant objected to the charge; the rest are silent on that point.

The district court cases do not explain why convictions based on erroneous instructions are fundamental error. Our own investigation has yelded the following information.

As stated by the United States Supreme Court:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201

(1948). The Court went on to comment that:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Id. As support for this statement, the Court cited DeJonge v. Oregon, 299 U.S. 353 (1937), wherein the Court had previously stated that "[c] onviction upon a charge not made would be a sheer denial of process." Id. at 362.

This Court has reached the same conclusion.

> The Constitution guarantees to every accused person...the right to know "the nature and cause of the accusation against him," and it necessarily follows that the accused cannot be indicted for one offense and convicted and sentenced for another, even though the offenses are closely related and of the same general nature or character and punishable by the same grade of punishment.

long applied rule 3.390(d) and its statutory predecessors to bar the appeal of instructions not objected to at trial. See Febre v. State, 158 Fla. 853, 30 So. 2d 367 (1947); Simmons v. State, 151 Fla. 778, 10 So.2d 436 (1942). Most recently, this Court applied the contemporaneous objection rule to the failure to object to instructions in Castor v. State. In Castor we commented that the

> requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.

365 So.2d at 703. See Clark v. State, 363 So.2d 331 (Fla. 1978); Wainwright v. Sykes, 433 U.S. 72 (1977).

This Court has previously refused to adopt an absolute rule that would allow

a defendant to object for the first time on appeal. Clark. We refuse to do so in this instance as well. Fundamental error has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error "very guardedly." Id. We agree with Judge Hubbart's observation that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Porter v. State, 356 So.2d 1268 (Fla. 3d DCA)(Hubbart, J., dissenting), remanded, 364 So.2d 892 (Fla. 1978), rev'd. on remand, 367 So.2d

705 (Fla. 3d DCA 1979).

An accused, as is required of the state, must comply with established rules of procedure designed to assure both fairness and reliability in the ascertainment of guilt and innocence. The failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial. "It is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity such error, if any, was invited and will not warrant reversal." Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974), cert. denied, 428 U.S. 911 (1976).

Contrary to the cases that Ray relies

on, the district courts have also found that instructing on a crime not charged does not necessarily constitute reversible error. Adam v. State, 387 So.2d 375 (Fla. 4th DCA 1980); Wilson v. State, 383 So.2d 670 (Fla. 5th DCA 1980); Carter v. State, 380 So.2d 541 (Fla. 5th DCA 1980); Odom v. State, 375 So.2d 1079 (Fla. 1st DCA 1979), cert. denied, 386 So.2d 640 (Fla. 1980); Smith v. State, 375 So.2d 864 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1202(Fla. 1980); Ray v. State, 374 So.2d 1002 (Fla. 2d DCA 1979);Lumia v. State, 372 So.2d 525 (Fla. 4th DCA 1979), cert. denied,381 So.2d 767 (Fla. 1980); Thompson v. State, 368 So.2d 670 (Fla. 3d DCA 1979); Jones v. State, 358 So.2d 37 (Fla. 4th DCA), cert. denied, 364 So. 2d 887 (Fla. 1978); McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971). These

cases have supported convictions based on crimes not specifically charged because of invited error, waiver, and/or estoppel.

In most of these cases, the failure to object has been coupled with affirmative acts either seeking or acquiescing in the erroneous instructions. Ray contends that these cases do not apply to the instant situation because the record is totally silent as to whether Ray's counsel requested or depended on the instruction at issue. He therefore claims that, even if fundamental error can be waived, no waiver has been shown here.

We agree that no waiver has been shown in the instant case. The two crimes instructed on by the trial court are both second-degree felonies, and lewd assault is not a permissible lesser included offense of sexual battery. On

these facts, silence alone is not sufficient to demonstrate a waiver.

If Ray's counsel had requested the improper instruction, or had affirmatively relied on that charge as evidenced by argument to the jury or other affirmative action we could uphold a finding of waiver absent an objection because constitutional error might not be fundamental error[5] and because even constitutional rights can be waived if not timely presented.[6] At trial, objecting to errorneous instructions is the responsibility of a defendant's attorney, and the attorney's failure to object to such instructions can properly constitute a waiver of any defects. See Wainwright v. Sykes, 433 U.S. 72 (1977)(Burger, C.J., concurring). If the instant complained-of instruction had been a permissible lesser included

offense, i.e., a crime of lesser degree or one subject to a lesser penalty, or had been includable under category 3 or 4 of Brown,[7] the district court would have been correct in affirming the conviction.

We hold, therefore, that it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so[8] if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action. Failure to timely object precludes relief from such a conviction. These conditions have not been met in the instant case,

and the district court opinion is quashed.

It is so ordered. (Sundberg, C.J., Adkins, Overton and England, J.J., Concur. Alderman, J., Concurs in part and dissents in part with an opinion with which Boyd, J., Concurs.)

ALDERMAN, J., Concurring in part, dissenting in part: I agree with the part of the majority opinion which holds that it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object, if the improperly charged offense is lesser in degree or penalty that the main offense. But I disagree with the majority's limitation of this rule to sitatuions where the improperly charged offense is lesser in degree and penalty than the main offense.

The Court has made it clear by rule

and by decision that in order to preserve for appeal the issue of the giving of or failure to give an instruction, the defendant must make a timely objection. Florida Rule of Criminal Procedure 3.390 (d); Castor v. State, 365 So.2d 701 (Fla. 1978). The obligation of a defendant to object is not obviated by the fact that the offense improperly charged upon is equivalent in penalty to the offense for which he is charged. The reconstructed record before us demonstrates that Ray did not object to the presently contested instruction, and the district court, therefore, properly determined that Ray is estopped from raising this point for the first time on appeal. By his silence, he has effectually consented to the amendment of the charges against him to conform to the evidence and to

include the additional charge of lewd and lascivious conduct. He has not been denied due process because, by his failure to object, he has waived the procedural right of prior notice of the specific charge. The conviction in this case came to the appellate court with a presumption of correctness. The burden was on the defendant to show that he timely objected to what would have been reversible error on the part of the trial court. The defendant has failed to meet this burden, and his conviction should be affirmed. (Boyd, J., Concurs.)

Footnotes:

[1] Sec. 794.011(5) provides that:
A person who commits sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof uses physical force and violence not likely to cause serious personal injury shall be guilty of a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

[2] Sec. 800.04 reads as follows:
Any person who shall handle, fondle or make an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without the intent to commit involuntary sexual battery shall be guilty of a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083 or sec. 775.084.

[3] Care should be taken to preserve the record of all action taken at charge conferences. This includes the designation of requested charges, all objections to the giving or denial of charges, and the identity of the complaining party.

4 Fla.R.Crim.P. 3.390(d) provides, in part, that:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection.

5 Clark v. State, 363 So.2d 331 (Fla. 1978).

6 Id.; Rubin v. State, 368 So.2d 69 (Fla. 3DCA 1979).

7 In re Standard Jury Instructions (Criminal Cases), No. 58,799 (Fla. Apr. 16, 1981), contains, as an appendix, a schedule of lesser included offenses. This schedule is presumptively correct and complete, and the Court expects that using the schedule will lessen the confusion surrounding lesser included offenses.

8 Failing to object to improper instructions is thus analogous to failing to object to faulty informations; both failures will result in waiver. See Tracey v. State, 130 So.2d 605 (Fla. 1961); Haselden v. State, 386 So.2d 624 (Fla. 4DCA 1980).

APPENDIX P

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

October 27, 1981

Andrea T. Mohel, Esq.
Assistant Attorney General
Suite 204
111 Georgia Avenue
West Palm Beach, Florida 33401

RE: Ernest P. Murphy and
Louie L. Wainwright v.
Don A. Adams
A-351

Dear Ms. Mohel:

Your application for a stay in the above-entitled case has been presented to Justice Powell, who has endorsed thereon the following:

"Denied
L.F.P.
10/27/81"

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Katherine Downs
Assistant Clerk

rwk

cc: Joseph F. McDermott, Esq.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 10 1981
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-910

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,
Petitioners,

v.

DON A. ADAMS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

JOSEPH F. McDERMOTT
544 First Avenue North
St. Petersburg, Florida
813-898-6230 33701
Counsel for Respondent

JIM SMITH
Attorney General
Tallahassee, Florida 32301

ANDREA T. MOHEL
Assistant Attorney General of Florida

ROBERT L. BOGEN
Assistant Attorney General of Florida
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
305-837-5062

I

QUESTION FOR REVIEW

PETITIONER HAS FAILED TO DEMONSTRATE APPROPRIATE JURISDICTIONAL REQUIREMENTS FOR CERTIORARI AS SET FORTH IN U.S. SUPREME COURT RULES, RULE 17

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ISSUE

PETITIONER HAS FAILED TO DEMONSTRATE APPROPRIATE JURISDICTIONAL REQUIREMENTS FOR CERTIORARI AS SET FORTH IN U.S. SUPREME COURT RULES, RULE 17

ARGUMENT

Petitioners seek certiorari based on so called conflicts between federal and Florida state decisions. Conflict simply does not exist in this case.

In the case at bar, the Fifth Circuit in Adams v Murphy, _____F. 2d _____ (5th Cir. 1981 Case No. 78-2406) (not officially reported) that Respondent Adams could not be convicted of the non-existent crime of "attempted perjury." (A-1)

The issue presented to the 5th Circuit arose from the granting of Adams Petition for Writ of Habeas Corpus in the U.S. Middle District of Florida wherein the trial judge held that a conviction for a non-existent crime was a violation of due process.

Florida officials sought review of that decision by appeal to the 5th Circuit.

In reaching a determination of the appeal, the 5th Circuit sought and obtained the Florida Supreme Court's opinion on the following limited certified question:

> "Is attempted perjury in an official proceeding a criminal offense under the laws of Florida?"

Adams v Murphy, 598 F. 2d 982 (5th Cir. 1979) (A-7)

In responding to the certified question the Florida Supreme Court stated:

> "We conclude that there can be no crime of attempted perjury.
>
> We answer the certified question in the negative."

Adams v Murphy, 394 So. 2d 411 (Fla. 1981) (A-16)

Thus supplied with Florida's own interpretation of Florida law, the 5th Circuit determined that Respondent Adams writ of habeas corpus issue and affirmed the trial judge.

The 5th Circuit Court of Appeals held:

> "No-where in this country can any man be condemned for a non-existent crime."

Adams v Murphy, _____ F. 2d _____ (5th Cir. 1981, Case No. 78-2406 not yet officially reported) (A-1)

Rule 17.1(a), Supreme Court Rules states in part:

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

See Fay v Noia, 83 S. Ct. 822: 372 U.S. 391, 9 L. Ed. 2nd 837.

In Rice v Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed. 897 (1955) it was stated:

"Special and important reasons," within this rule relating to granting of certiorari, relate to problems beyond the academic or episodic, expecially where issues involved reach constitutional dimensions.

Respondent submits that the issues

presented by Petitioner do not meet the "special and important reasons" requirements of Rule 17.

The Petitioner has failed to demonstrate a conflict between a federal court of appeals and a state court of last resort as required by Rule 17.1 (a). The 5th Circuit decision below was rendered upon a certified question to the Florida Supreme Court. Thus, the 5th Circuit of Appeals followed the state court of last resort's decision and merely decided that due process does not permit conviction for a non-existent crime.

Petitioner's claim that prejudice has not been shown does not recognize the essential issue decided by the 5th Circuit Court of Appeals. Obviously, being held

criminally responsible for a non-existent crime is prejudicial *per se*.

CERTIFICATE OF SERVICE

Joseph F. McDermott, Attorney and member of the Bar of the United States Supreme Court does hereby certify that the Respondent's Brief in opposition to Petition for Writ of Certiorari has been served upon Petitioner's Attorney, Honorable Jim Smith, Attorney General, Tallahassee, Florida, 32301, and Andrea T. Mohel, Assistant Attorney General, 225 Pan American Building, West Palm Beach, Florida, 33401, by U.S. Mail by depositing the same with the U.S. Post Office, Downtown Branch, St. Petersburg, Florida, in accordance with U.S. Supreme Court Rule 28.2 and that all parties required to be served have been served, to-wit:

JIM SMITH
Attorney General
Tallahassee, Florida 32301

ANDREA T. MOHEL
Assistant Attorney General
225 Pan American Bldg.,
West Palm Beach,
Florida 33401

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue
Suite 204
West Palm Beach,
Florida 33401

Dated this 10 day of
Dec., 1981

JOSEPH F. McDERMOTT
Attorney at Law
544 First Avenue North
St. Petersburg, Florida 33701
813-898-6230
Attorney for Respondent

APPENDIX

598 F.2d 982 (5th Cir. 1979). We need repeat only a little of this here.

Petitioner Adams was charged with testifying falsely to a Florida grand jury. At the close of evidence in his state trial, defense requested a charge on "attempted perjury" as a lesser-included offense.[1*] Though expressing doubt that such a crime existed, the trial court charged the jury both on perjury and "attempted perjury." Obedient to Murphy's Law,[2] the jury brought Adams in "guilty of the lesser included offense of attempted perjury."

After exhausting Florida remedies, Petitioner sought habeas of our district court, which concluded that no such offense as attempted perjury existed under Florida law and granted

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*Footnotes at end of opinion.

the writ on due process grounds. On the state's appeal to us, we determined that the Florida law was doubtful as to the existence of such a crime as attempted perjury and certified that question to the ever-helpful Florida Supreme Court.[3] In due course that court replied--in a four to three decision--that Florida law recognizes no such crime as attempted perjury. Adams v. Murphy, 394 So. 2d 411 (Fla. 1981).[4] Florida now argues that since the error was invited by defense counsel -- as surely it was--the writ should not issue. Indeed, to be candid, we must put the matter somewhat higher: counsel did not merely invite, he demanded the erroneous charge given.

Even so, Adams must go free. Florida has told us that he went to

prison for an act that is not and has never been a crime under Florida law. Counsel's tactical choices may, in many circumstances, effectively contribute to his client's conviction. Advantages foregone for ephemeral benefits do not necessarily eventuate in writs. But only a legislature can denounce crimes. In a more complex case, we might proceed upon a more limited rationale, might resort to the solace of prior authority. Here there is no need. Nowhere in this country can any man be condemned for a nonexistent crime. [5]

It may be that the jury semi-pardoned Adams, by convicting him of the non-existent, lesser-included offense. Even if this be so, there can be no doubt that it acquitted him

of perjury; he can therefore never be tried again for that offense. Nor, of course, can he be called to account for the nonexistent crime. The district court was right. The writ must issue.

AFFIRMED.

---

[1] Florida has a general attempts statute, Fla. Stat. §706.04 (1973)

[2] "If anything can go wrong, it will."

[3] Which has rejected none of our more than 30 requests for assistance, made in the course of the last 20 years.

[4] In a special concurrence, one of the Florida justices emphasized the invited nature of the trial error and the basic injustice involved in freeing petitioner on such a ground. While we symphathize with the latter sentiment, we are unable to avoid the perhaps unfortunate result in this particular case, concluding, as we must and do, that the law demands it for reasons that transcend a given case.

[5] To be distinguished are such decisions as Grier v United States,

472 F. 2d 1157 (5th Cir. 1973), and Smedberg v United States, 448 F. 2d 401 (5th Cir. 1971), which concern merely the waiver of defenses by an informed guilty plea. The analog to our case in that context would be a plea of guilty tendered to a non-existent offense, say, ogling, as a lesser-included one to a charge of rape.

APPENDIX B

DON A. ADAMS,
Petitioner-Appellee,

v.

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,
Respondents-Appellants.

NO. 78-2406

United States Court of Appeals,
Fifth Circuit

July 13, 1979

Benedict P. Kuehne, Asst. Atty. Gen., West Palm Beach, Fla., for respondents-appellants.

Joseph F. McDermott, St. Petersburg, Fla., for petitioner-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before THORNBERRY, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

The court has determined that this case presents a question of Florida law appropriate for resolution by the courts of that state. We will, therefore, defer

our decision in this matter pending certification of the issue to the Florida Supreme Court. Our usual practice[1*] is to request that the parties submit a proposed statement of facts and proposed agreed certificate of the questions for decision, but because the facts are uncontested and because the question to be certified is a narrow one, we have drafted the Statement of Facts and the Question for Certification.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO SECTION 25.031, FLORIDA STATUTES 1975, AND RULE 4.61, FLORIDA APPELLATE RULES

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Fifth Circuit that the above-styled case in this Court involves a question or proposition of law of the

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*Footnotes at end of opinion

State of Florida which may be determinative of the cause, and there appear to be no clear, controlling precedents in the decisions of the Supreme Court of Florida. The United States Court of Appeals for the Fifth Circuit therefore certifies the following question of law of the State of Florida to the Supreme Court of Florida for instructions concerning such question of law, based on the facts recited herein, pursuant to section 25.031, Florida Statutes 1975, and Rule 4.61, Florida Appellate Rules, as follows:

1. Style of the case. The style of the case in which this certificate is made is as follows: Don A. Adams, petitioner-appellee, versus Ernest P. Murphy and Louie L. Wainwright, respondents-appellants, Case No. 78-2406, United States

Court of Appeals for the Fifth Circuit, on appeal from the United States District Court for the Middle District of Florida.

II. Statement of facts. Petitioner-Adams was indicted in 1974 for the crime of perjury, in violation of section 837.02, Florida Statutes. Adams was charged with testifying falsely while under oath before a grand jury proceeding. After all the evidence had been presented at Adams' trial, the Florida trial court held a charge conference with counsel. The Attorney who represented Adams affirmatively requested[2*] that the jury be given a lesser-included offense instruction on the crime of attempted perjury. Although the trial judge expressed uncertainty about whether attempted perjury was a crime, he in-

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*Footnotes at end of opinion

cluded the requested instruction in his charge to the jury.[3*] The jury found Adams guilty of the crime of attempted perjury.

Petitioner appealed his conviction to the Florida Fourth District Court of Appeal, which affirmed in a one-line per curian decision. Certiorari was initially granted by the Florida Supreme Court but was later withdrawn for want of jurisdiction. Adams subsequently filed a petition for a writ of habeas corpus which the Florida Supreme Court, raising a contention that no crime of attempted perjury existed under Florida law. Relief was denied by the Florida Supreme Court without written opinion in an order dated December 9, 1976.

Following an unsuccessful motion for

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*Footnotes at end of opinion

post-conviction relief pursuant to Fla. R. Crim. P. 3.850, Adams filed a petition for habeas corpus relief in the United States District Court for the Middle District of Florida. After finding that Adams had exhausted his state remedies, the district court granted relief and held, relying on Silvestri v. State, 332 So. 2d 351 (4th Dist. Ct. App. Fla.), aff'd per curiam, 340 So. 2d 928 (Fla. 1976), that attempted perjury was not a crime under the laws of Florida. Thus, the court below agreed with Adams that instructing the jury on attempted perjury was a violation of due process of law and that his conviction and incarceration for a nonexistent offense violated the fourteenth amendment of the United States Constitution.

III. Question to be certified to the

Florida Supreme Court.[4*] Is attempted perjury in an official proceeding a criminal offense under the laws of Florida?

The entire record in this case, together with copies of the briefs of the parties, and all the papers are transmitted herewith.

CERTIFIED

1* See In re McClintock, 558 F 2d 732 (5th Cir. 1977).

2* The pertinent discussion took place as follows:

BY THE COURT: Have both of you looked at and approved the verdicts?
BY MR. DAUKSCH (Adams' counsel): No, I haven't looked at them. That is the one thing I apologize to the Court for. I didn't do it.
How about attempted perjury?
BY THE COURT: Well, do you think that is a lesser included offense?
BY MR. DAUKSCH: Well, I don't know. I think that the courts have

held that everything has an attempt to it.

BY THE COURT: You want an attempt? I am not certian there is such a crime, but if you want it I'll put it in there.

BY MR. DAUKSCH: I do specifically request it.

BY THE COURT: All right. Fine.

3* The circuit court charged the jury, in part, as follows:

> It is a crime for any person to attempt to commit an offense prohibited by law and in such attempt do any act toward the commission of such offense. The charge of perjury includes a charge of the lesser offense of an attmept to commit that crime. An attempt to commit a crime consists of the formation of an intention to commit that particular crime at that particular time and place, and the doing of some physical act toward and which was intended to accomplish the commission of the crime. The act done must be more than mere preparation to commit the crime. It must be one intended to actually do the wrong which constitutes the crime.

4* We repeat an oft-stated principle:

> (T)he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved in the issues as the Supreme Court preceives them to be in its analysis of the record

APPENDEX C

DON A. ADAMS,
Petitioner-Appellee,

v.

ERNEST P. MURPHY and
LOUIE L. WAINWRIGHT,
Respondents-Appellants.

No. 57451

Supreme Court of Florida

Jan. 29, 1981

Joseph F. McDermott, St. Petersburg, for petitioner-appellee.

Jim Smith, Atty. Gen. and Benedict P. Kuehne and Paul H. Zacks, Asst. Attys. Gen., West Palm Beach, for respondents-appellants.

BOYD, Justice

This cause is before the Court on the certificate of the United States Court of Appeals for the Fifth Circuit that a question of Florida law upon which there is no controlling precedent is determinative of the instant appeal pending in

that court. Adams v Murphy, 598 F. 2d 982 (5th Cir. 1979). We have authority to answer the certified question by written opinion. Fla.R.App.P. 9.510.

Adams was charged with the crime of perjury in violation of section 837.02, Florida Statutes (1973). It was alleged that he had lied to a grand jury. At trial, Adams' attorney requested that the court instruct the jury on the crime of attempted to commit perjury. The court gave the requested instruction and the jury returned a verdict finding Adams guilty of attempted perjury.

On appeal, the judgment of conviction of attempted perjury was affirmed, per curiam, without opinion. Adams v State, 320 So.2d 58 (Fla. 4th DCA 1975). Adams then sought review in this Court. The Court initially issued the writ of certiorari but later determined that it

lacked jurisdiction. The writ was discharged. Adams v State, 339 So. 2d 214 (Fla. 1976). A subsequent petition for writ of habeas corpus, filed in this Court, was denied.

The case is pending in the Fifth Circuit on appeal from an order of the United States District Court for the Middle District of Florida, which granted Adams relief on his petition for writ of habeas corpus. The district court ruled that the Florida trial court's instruction on and judgment of conviction of the nonexistent offense of attempted perjury denied due process. The United States Court of Appeals has certified the following question: "Is attempted perjury in an official proceeding a criminal offense under the law of Florida?"

Section 837.02, Florida Statutes (1973),

provieds:

> Whoever being lawfully required to depose the truth in any proceeding in a court of justice, commits perjury, shall, if the perjury is committed on the trial of an indictment for a capital crime, be guilty of a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084; and if committed in any other case, guilty of a felony of the second degree, punishable as provided in §775.082 or §775.083.

Thus the statute forbids, but does not fully define, the crime of perjury. In such circumstances, it is appropriate to look to the common law for the definition of the crime. Carnley v State, 88 Fla. 281, 102 So. 333 (1924)

In the decisional law of Florida, perjury is defined as the willful giving of false testimony under lawful oath on a material matter in a judicial proceeding. E.g., Gordon v State, 104 So. 2d 524 (Fla. 1958); Miller v State, 15 Fla. 577 (1876)

Appellees-respondents, officials of the State of Florida, argue that there is such a crime as attempted perjury. They suggest that the existence of such a crime is logically plausible for the following reasons. An attempt consists of a specific criminal intent to commit the crime and an overt act beyond preparation toward that end. Therefore, one who intentionally testifies falsely under oath, unaware that the testimony is not material or that the person administering the oath has no authority to do so or that the proceeding is not an official judicial proceeding, commits the crime of attempted perjury.

Appellees-respondents correctly state that an attempt to commit crime consists of two essential elements: a specific intent to commit the crime and an

overt act, beyond mere preparation, done towards its commission. Turner v State, 100 Fla. 1078, 130 So. 617 (1930); Gustine v State, 86 Fla. 24, 97 So. 207 (1923). The intent and the act must be such that they would have resulted, except for the interference of some cause preventing the carrying out of the intent, in the completed commission of the crime. The State of Florida has incorporated this definition in its general attempt statute:

> Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in the perpetration, or is intercepted or prevented in the execution of the same, shall when no express provision is made by law for the punishment of such attempt, be punished as follows:

§776.02, Fla. Stat. (1973). Thus the state officials' argument is that where

the intent and the overt act of falsely testifying are shown, but the crime is not completed because one of the other elements is lacking, then the facts establish the crime of attempted perjury.

Even though we have a broadly applicable general attempt statute in Florida, there are some crimes of which it can be said that the attempt thereof simply does not exist as an offense. See, e.g., State v Thomas, 362 So. 2d 1348 (Fla. 1978) (attempted possession of burglary. tools is not a crime); King v State, 317 So. 2d 852 (Fla. 1st DCA 1975) (attempted uttering of a forged instrument is not a crime).

In King v State, the defendant was charged with uttering a forged instrument. At trial, he asked that the jury be charged on attempt pursuant to Florida

Rule of Criminal Procedure 3.510. The court refused. The defendant was convicted and on appeal assigned the refusal to instruct as error. The appellate court said: "If a crime is itself an attempt to do an act or accomplish a result, there can be no attempt to commit that crime." Id. at 853. Applying this principle, the court held that under Florida law there is no offense of attempted uttering of a forged instrument, and therefore the refusal to charge on attempt was proper.

This view of the nature of criminal attempts was also expressed in Hutchinson v State, 315 So. 2d 546 (Fla. 2d DCA 1975), where the state prosecuted a solicitation as an "attempted conspirary." The court analyzed the general attempt statute. The court prefaced its analysis

as follows:

> In construing a criminal statutory provision, the primary function of the court is to give effect to the intent of the legislature; and in so doing, each section of the criminal code should be considered in making this determination. But it is also axiomatic that statutes creating and defining crimes cannot be extended by construction or interpretation to punish an act, however wrongful, unless clearly within the intent and terms of the statute. Bradley v. State, 1920, 79 Fla. 651, 84 So. 677.

Id. at 547. The court then observed that the general attempt statute by its terms can apply to any offense, but went on to explain why conspirary is an exception:

> We note that §776.04 purports to prohibit an attempt to commit any offense prohibited by law. Since there is no express limitating language as to what crimes may or may

not be criminally attempted, the statute would appear to prohibit attempted conspiracy if it were not for the remaining language of the statute, and the history and judicial construction of the crime of attempt. Construing the words "and in such an attempt does any act toward commission of such an offense but fails in the perpetration, or is intercepted or prevented in the execution of the same," we think the legislature intended to limit attempts to physical acts carried beyond preparation toward proximate accomplishment of what would be a complete crime. In this respect, solicitation and conspiracy are more remote from the actual perpetration of the intended crime than is an attempt to commit it. This conclusion is supported by Florida courts that have interpreted an attempt to consist of two essential elements: 1) a specific intent to commit the crime; and 2) a separate overt ineffectual act done toward its commission; Robinson v. State, Fla. App. 3d 1972, 263 So. 2d 595; Groneau v State, Fla. App. 4th 1967, 201 So.2d 599; Gustine v State, 1923,

86 Fla. 24, 97 So. 207.

Id. at 547-548.

The Florida case that is perhaps most closely analogous to the problem we are presented with now is Silvestri v. State, 332 So. 2d 351 (Fla. 4th DCA 1976). There the appellant was charged with, among other things, making a false report of a crime. She was convicted of an attempt to make such a false report. The court compared the problem to that of uttering a forged instrument, discussed above:

> Just as the crime of uttering a forged instrument may be proven merely by an attempt to negotiate one. Harrell v. State, 79 Fla. 220, 83 So. 922 (1920), so it would seem, the offense of making a false report is fully proven by demonstrating an attempt to convey false information to a police officer. Thus, the holding of the First District in King v State, 317 So. 2d 852 (Fla. App. 1st

> 1975) which we followed in Jackson v State, 328 So. 2d 457 (Fla. App. 4th 1976) that there is no offense in Florida of attempted uttering of a forged instrument because "there can be no attempt to commit .." a crime which "is itself an attempt to do an act or accomplish a result"... 317 So. 2d at 853, directly applies. See People v. Schmidt, 76 Misc. 2d 976, 352 N.Y.S. 2d 399, 403 (Crim. Ct. 1974) (no offense of "attempted 'interference with governmental administration'")

We find this reasoning to be directly applicable to the question of whether there can be an attempt to violate section 837.02, Florida Statutes (1973)

We are not persuaded by the argument that the crime of attempt can be extended to cover attempted perjury. The argument is based on the hypothetical where the intention to perjure is frustrated by the absence of an element extraneous to

the offender's actions, such as the authority of the person administering the oath. In the typical case of a criminal attempt the factor distinguishing the attempt from the completed crime is that the intended criminal result, an element of the completed crime, was not achieved. In a case for example, of murder, or robbery, or arson, there is an interference or intervention preventing the consummation of the criminal intent: the victim did not die, or the robber did not get away with any money, or the fire went out without causing damage. The absence of the element of a criminal result is different from the absence of an element extraneous to the offender's conduct, such as the element of the authority of the person administering the oath.

The lack of such elements of the

crime. We conclude that there can be no crime of attempted perjury.

We answer the certified question in the negative. We direct the Clerk of the Court to return the case file and transmit a true copy of this opinion to the United States Court of Appeals for the Fifth Circuit.

It is so ordered.

SUNDBERG, C.J., and ADKINS, J., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

ALDERMAN, J., dissents with an opinion, with which ENGLAND and McDONALD, J.J., concur.

OVERTON, Justice, concurring in part, dissenting in part.

I concur in the finding that attempted perjury is not a crime, but, under the facts of this case, I would advise the Fifth Circuit Court of Appeals that this

cause must be remanded for a new trial and that the defendant should not be discharged.

By his counsel, the defendant in this cause directly induced the trial court to include attempted perjury as a lesser included offense. He now contends he is entitled to a discharge because the judge granted this request and the government failed to object. Our criminal justice system will reach a new height in ridiculousness if a defendant through his counsel can cause erroneous verdict choices or alternatives to be presented to the jury and then walk free because of the problem created. This is not justice and should not be allowed under any circumstances. At most, the defendant is entitled to a new trial.

ALDERMAN, Justice, dissenting.

Where there is an intent to commit perjury and there is an overt act of falsely testifying but the crime is not completed because one of the essential elements of the crime of perjury, such as materiality, is lacking the facts establish attempted perjury. The majority explains the elements of perjury and the definition of attempt, yet, inconsistently with its definitions, concludes that the crime of perjury is fully proven by an attempt to commit the crime of perjury and that, therefore, there is no such crime of attempted perjury. This cannot be true because if materiality or the authority of the person administering the oath is lacking, then there can be no crime of perjury. However, if any one of these particular elements is

lacking yet defendant has formulated an intention to commit perjury during an official proceeding and has done a physical act intended to accomplish the commission of the crime other than mere preparation to commit the offense but has failed in the actual commission of the offense, then he has committed attempted perjury. I would, therefore, answer the certified question in the affirmative.

ENGLAND and McDONALD, J.J., concur.